83-1286

Case No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CELESTE C. GRYNBERG AND DEAN G. SMERNOFF, AS CO-TRUSTEES FOR THE STEPHEN MARK GRYNBERG TRUST,

Plaintiffs-Appellants,

v.

WILLIAM CLARK, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR;
GEORGE FRANCIS, COLORADO STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR;
INTERIOR BOARD OF LAND APPEALS, UNITED STATES DEPARTMENT OF THE INTERIOR; AND
JOSEPH W. GOSS AND JOAN B. THOMPSON, JUDGES THEREOF,

Defendants-Appellees.

ON WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CORRECTED PETITION FOR WRIT OF CERTIORARI

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January 25, 1984

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decisions below erred in finding that Co-Trustee Celeste C. Grynberg breached her fiduciary duty to the Grynberg Trust when she filed a lease offer on behalf of the Grynberg Trust, and also individually on her behalf, on the same lease parcel in a simultaneous oil and gas lease drawing conducted by the Colorado State Office of the Bureau of Land Management ("BLM").

2. Whether the district court and Interior Board of Land Appeals ("IBLA") decisions, to the extent that they find that the parents of the Grynberg Trust beneficiary enjoyed a multiple chance of success, are supported by substantial evidence in the record.

3. Whether the decisions below are erroneous to the extent that their interpretation of 43 C.F.R. § 3100.0-5(b) departs significantly from previous agency and judicial interpretations of that regulation, thereby depriving the Grynberg Trust unlawfully of a vested property right.

PARTIES

In addition to the parties listed in the caption of this petition, Cecil D. Andrus and James G. Watt were, in their capacity as Secretary of the Interior, defendants below. The current Secretary of the Interior, William Clark, is automatically substituted as a party defendant in this petition.

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Case No.

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WILLIAM CLARK, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR;

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JOSEPH W. GOSS AND JOAN B. THOMPSON, JUDGES THEREOF,

Defendants-Appellees.

CORRECTED PETITION FOR WRIT OF CERTIORARI

Celeste C. Grynberg and Dean G. Smernoff as Co-Trustees for the Stephen Mark Grynberg Trust (hereinafter "Grynberg Trust") hereby file their Corrected Petition for Writ of Certiorari:

DECISIONS BELOW

This is an appeal from the decision entered by the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *Celeste C. Grynberg, et al. v. Watt, et al.*, No. 81-1315 (September 21, 1983). A copy of the Slip Opinion for that case is appended hereto as part of Appendix A. The

appeal before the Tenth Circuit was taken from a judgment of the United States District Court for the District of Colorado, resulting from its Memorandum Opinion and Order in the consolidated cases of *June Oil and Gas, Inc., et al. v. Andrus, et al. and Grynberg, et al. v. Andrus, et al.*, No. 79-K-1334, 506 F. Supp. 1204 (D. Colo. 1981). A copy of that Memorandum Opinion and Order is appended hereto as part of Appendix A. The appeal to the United States District Court for the District of Colorado was taken from a decision of the Interior Board of Land Appeals in *Celeste C. Grynberg, Dean G. Smernoff*, 44 IBLA 197 (1979), a copy of which is appended hereto as part of Appendix A.

The date of the judgment rendered by the Tenth Circuit was September 21, 1983. The date of the Memorandum Opinion and Order entered by the United States District Court for the District of Colorado was January 16, 1981, with its final judgment being entered on January 20, 1981.

JURISDICTION

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254.

APPLICABLE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS[1]

The Mineral Lands Leasing Act, 30 U.S.C. §§ 181, *et seq.*, which provides in pertinent part as follows:

> § 181. *Lands Subject to Disposition; Persons Entitled to Benefits; Reciprocal Privileges; Helium Rights Reserved.* Deposits of coal, phosphate, sodium, potassium, oil, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impreg-

1. All references to statutes and regulations are as they appeared in 1978.

nated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried) or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this chapter to citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter . . .

§ 226. *Lease of Oil and Gas Lands — Authority of Secretary.*

(a) All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.

* * *

Lands not within geologic structure of a producing oil or gas field; first qualified applicant.

(c) If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding. Such leases shall be conditioned upon the payment by the lessee of a royalty of 12½ per centum in amount

or value of the production removed or sold from the lease.

The following regulations, published in Title 43 C.F.R., are relevant to this case:

§ 3100.0-5 Definitions

(b) Sole party in interest. A sole party in interest in a lease or offer to lease is a party who is and will be vested with all legal and equitable rights under the lease. No one is, or shall be deemed to be, a sole party in interest with respect to a lease in which any other party has any of the interests described in this section. The requirement of disclosure in an offer to lease of an offeror's or other parties' interest in a lease, if issued, is predicated on the departmental policy that all offerors and other parties having an interest in simultaneously filed offers to lease shall have an equal opportunity for success in the drawings to determine priorities. Additionally, such disclosures provide the means for maintaining adequate records of acreage holdings of all such parties where such interests constitute chargeable acreage holdings. An "interest" in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such "interests." Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease.

§ 3112.2-1 Offer to lease.

(a) Entry Card. Offers to lease such designated leasing units by parcel numbers must be submitted on a form approved by the Director, "Simultaneous Oil and Gas Entry Card" signed and fully executed by the applicant or his duly authorized agent in his behalf. The entry card will constitute the applicant's offer to lease the numbered leasing unit by participating in the drawing to determine the successful drawee.

(1) The entry card must be accompanied by a remittance covering the filing fee of $10. The filing fee may be paid in cash or by money order, bank draft, bank cashier's check or check.

(2) Only one complete leasing unit, identified by parcel number, may be included in one entry card. Lands not on the posted list may not be included. An offeror (applicant) is permitted to file only one offer to lease (entry card) for each numbered parcel on the posted list. Submission of more than one entry card by or on behalf of the offeror for any parcel on the posted list will result in the disqualification of all the offers submitted by that applicant for that particular parcel.

(3) Three entry cards will be drawn for each numbered leasing unit, and the order in which they are drawn will fix the order in which the successful drawee will be determined. Where less than three entry cards have been filed, all cards will be drawn to determine priority.

(4) Unsuccessful drawees will be notified by the return of their respective entry cards.

§ 3112.5-2 Multiple filings.

When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or partly [sic] acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3110.1-6(b), all offers filed by either party will be rejected. Similarly, where an agent or broker files an offer to lease for the same lands in behalf of more than one offeror under an agreement that, if a lease issues to any of such offerors, the agent or broker will participate in any proceeds derived from such lease, the agent or broker obtains thereby a greater probability of success in obtaining a share in the proceeds of the lease and all such offers filed by such agent or broker will also be rejected. Should any such offer be given a priority as a result of such a drawing, it will be similarly rejected. In the event a lease is issued on the basis of any such offer, action will be taken for the cancellation of all interests in said lease held by each person who acquired any interest therein as a result of collusive filing unless the rights of a bonafide purchaser as provided for in § 3102.1-2 intervene, whether the pertinent information regarding it is obtained by or was available to the Government before or after the lease was issued.

STATEMENT OF THE CASE

The Grynberg Trust was established on August 1, 1969, by Jack Grynberg for his son Stephen Mark Grynberg. Companion trusts were also established by the same instrument for Stephen's siblings, Rachel Susan Grynberg and Miriam Zela Grynberg. These irrevocable discretionary support

trusts are managed by Co-Trustees Dean G. Smernoff and Celeste C. Grynberg, the children's mother. In February, 1978, drawing entry cards were filed for Parcel CO-167 by each of the three trusts, and by Jack Grynberg and Celeste Grynberg, individually. There were 599 drawing entry cards filed in the lottery for Parcel CO-167. The Grynberg Trust received first priority on the parcel.

The BLM rejected all five offers as violative of the regulatory prohibition against multiple filings found at 43 C.F.R. § 3112.5-2. Plaintiffs appealed to the IBLA which affirmed the BLM's rejection of the lease offers. *Celeste C. Grynberg, Dean G. Smernoff*, 44 IBLA 197, 203 (1979).

The district court affirmed the decision of the IBLA. Its conclusion was that the IBLA decision rejecting the five offers was neither arbitrary, capricious, abusive of discretion nor otherwise not in accordance with the law. Appellants before this Court are Celeste C. Grynberg and Dean G. Smernoff as Co-Trustees ("Co-Trustees") for the Grynberg Trust.

The IBLA and district court concluded that a filing by the Co-Trustees individually and on behalf of the Grynberg Trust created a prohibited multiple filing in violation of 43 C.F.R. § 3112.5-2, in that the Co-Trustees would be breaching the fiduciary duty owed to the Grynberg Trust by competing with the Grynberg Trust for the lease. The IBLA reasoned that if the Co-Trustees were to win the lease they would have to hold it in trust for the beneficiary. According to the IBLA, the result would give the Grynberg Trust two chances of success and would be (if an action would be brought by the Grynberg Trust) an increased probability of success for the Grynberg Trust in violation of the multiple filing regulation. The Tenth Circuit upheld the district court and IBLA rulings on the basis of this theory.

JURISDICTION OF THE FEDERAL COURT

The statutory basis for federal jurisdiction in the United States District Court for the District of Colorado was the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*

REASONS FOR ALLOWANCE OF THIS WRIT

I. WHETHER THE DECISIONS BELOW ERRED IN FINDING THAT CO-TRUSTEE CELESTE C. GRYNBERG BREACHED HER FIDUCIARY DUTY TO THE GRYNBERG TRUST WHEN SHE FILED A LEASE OFFER ON BEHALF OF THE GRYNBERG TRUST, AND ALSO INDIVIDUALLY ON HER BEHALF, ON THE SAME LEASE PARCEL IN A SIMULTANEOUS OIL AND GAS LEASE DRAWING CONDUCTED BY THE COLORADO STATE OFFICE OF THE BUREAU OF LAND MANAGEMENT.

No violation of the "multiple filings" regulation, 43 C.F.R. § 3112.5-2, occurred. The decisions of the courts and agency below wrongly interpret basic trust law and the trust laws of the State of Colorado, where the Grynberg Trust was established and where the oil and gas lease in question would be awarded. A breach of a trustee's fiduciary duty exists only if the trustee "enters into a substantial competition with the interest of the beneficiary." Restatement (Second) of Trusts, § 170.P. Generally, a trustee may engage in a business which is in competition with the trust's activities if, (1) the trustee is not using information which was gained by the trustee as a direct result of his acting in a trustee capacity, and (2) the trustee treats the trust beneficiary at least as well as she treats herself. 2 *Scott on Trusts*, § 170.23 (3d ed. 1967); *Colorado & Utah Coal Company v. Harris*, 97 Colo. 309, 49 P.2d 429 (1935) (corporate officer acquiring a mining lease on lands in which corporation had only an "expectancy" did not comprise unlawful competition or usurpation of corporate opportunity); *Carper v. Frost Oil Co.*, 72 Colo. 343, 211 P. 370 (1922) (no constructive trust on oil and gas lease obtained by president and officer of corporation where the president learned of lease in individual capacity and obtaining it would not defeat the plans and purposes of the corporation); *Burg v. Horn*, 380 F.2d 897 (2d Cir. 1967) (no duty imposed on officers or directors who engaged in similar business to that of corporation to offer all opportunities to the corporation where

certain opportunities did not come to officers' attention through corporation). There is no evidence in the record to show that the opportunity to file on the lease in question came to the Co-Trustees' attention in anything but their individual capacity. Indeed, no hearing has ever been held in this matter at any level of administrative or judicial review of this case. In fact, the admitted evidence demonstrated that the Co-Trustees had, as individuals, been making such filings for many years before the Grynberg Trust was established. Therefore, the finding of illicit competition by virtue of improper information was not supported by evidence in the record and the refusal to issue the lease to the Grynberg Trust was erroneous.

In the case at bar, "substantial competition" between the Grynberg Trust and the Co-Trustee in her individual capacity did not exist. Five hundred ninety-nine (599) drawing entry cards were submitted on Parcel CO-167. The cases in which unlawful competition has been found involved cases in which a trustee or other fiduciary acquired property without informing the trust or other entity of the opportunity, in the course of performing duties in his fiduciary capacity, and where the fiduciary was the trust's only competition. *See Wooton v. Wooton*, 151 F.2d 147, 161 ALR 1027 (10th Cir. 1967); *Irvin v. West End Development Company*, 481 F.2d 34 (10th Cir. 1973); *Young v. Bradley*, 142 F.2d 658 (6th Cir. 1944). In those cases, and in accordance with basic trust law, the fiduciary breached his obligation to the trust or other entity because he did not treat the trust equally (i.e., did not compete on behalf of the entity), but rather competed unfairly against the trust or other entity.

In the case at bar, the Grynberg Trust was given an equal opportunity to acquire the property in relation to the opportunity presented to the Co-Trustee Celeste C. Grynberg, individually. Celeste C. Grynberg filed a drawing entry card on behalf of the Grynberg Trust and on behalf of herself individually. Five hundred ninety-seven (597) other parties competed for the lease acquired by the Grynberg

Trust. Co-Trustee Celeste C. Grynberg, in her individual capacity, treated the Grynberg Trust equally to herself, filing drawing entry cards on behalf of both the Grynberg Trust and herself. Therefore, the determination that the Co-Trustee competed unfairly with the Grynberg Trust and breached her fiduciary duty to the Grynberg Trust is arbitrary and is not supported by substantial evidence in the record. *See* 5 U.S.C. §§ 701, *et seq.*

The decision of the courts and agency below essentially would require that an individual trustee forebear from any business activity which was in any way similar to any business activity in which a trust might engage. Because in many cases a trust is authorized through its trustee to engage in nearly all types of business activity, the rulings below could require a trustee in his or her individual capacity to avoid any business activity whatsoever in which the trust might engage. For instance, Article V of the Grynberg Trust specifically authorized the Co-Trustee to participate in simultaneous oil and gas lease drawings. The only other alternative would be for the trustee to refuse to do any business on behalf of the trust; an act which would also be a breach of fiduciary duty. The determinations below are, therefore, arbitrary, capricious and contrary to the trust laws of the State of Colorado and other states.

II. WHETHER THE DISTRICT COURT AND INTERIOR BOARD OF LAND APPEALS DECISIONS, TO THE EXTENT THAT THEY FIND THAT THE PARENTS OF THE GRYNBERG TRUST BENEFICIARY ENJOYED A MULTIPLE CHANCE OF SUCCESS, ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The decisions below, to the extent that they find a violation of the "multiple filing" regulations, 43 C.F.R. § 3112.5-2, are arbitrary and capricious because they ignore the mandatory language of the Grynberg Trust. In order for a prohibited filing under 43 C.F.R. § 3112.5-2 to occur, an "agreement, scheme, or plan" which would give some party a greater

probability of successfully obtaining a lease must be shown to exist. The district court and IBLA reasoned that because both of the Grynberg parents filed an offer to lease on the same parcel as the Grynberg Trust, the *Grynberg parents* enjoyed a greater probability of success than is permitted by law because of (1) their individual filings and (2) the benefit the parents would receive by being relieved of parental support obligations if the Grynberg Trust was awarded the lease. This argument ignores the express langauge of the Trust Agreement which provides:

> The trustee is hereby authorized in the sole discretion of the trustee, at any time and from time to time, to distribute all or any part of the income and/or principal of each separate trust to the beneficiary of such trust . . . *provided, however, that no such distribution shall be made pursuant to this section which would satisfy a legal obligation of the grantor.*

Trust Agreement, Article IV, Section 1 (emphasis added). This language prohibits distributions by the Co-Trustees which would satisfy parental obligations, thereby eliminating the possibility that the Grynberg parents would benefit from the issuance of a lease to the Grynberg Trust. Thus, the decisions of the district court and the IBLA are arbitrary and capricious to the extent that they determined that the parents of the Grynberg Trust beneficiary would benefit if the Grynberg Trust were awarded the lease, thereby allegedly giving the parents a greater probability of success.

III. WHETHER THE DECISIONS BELOW ARE ERRONEOUS TO THE EXTENT THAT THEIR INTERPRETATION OF 43 C.F.R. § 3100.0-5(b) DEPARTS SIGNIFICANTLY FROM PREVIOUS AGENCY AND JUDICIAL INTERPRETATIONS OF THAT REGULATION, THEREBY DEPRIVING THE GRYNBERG TRUST UNLAWFULLY OF A VESTED PROPERTY RIGHT.

To the extent that the decisions below prohibit a minor child's trust and parents from filing on the same parcel they are arbitrary, capricious and discriminatory as between parents and children. The manner in which 43 C.F.R. § 3112.5-2 and § 3100.0-5 have been applied to the facts of this case represents a significant departure from previous agency rulings involving offers to lease filed by more than one family member depriving the Grynberg Trust of a vested property right. *See generally Shell Oil Co. v. Andrus*, 100 S.Ct. 1932 (1980). Husbands and wives have been permitted to file drawing entry cards for the same parcel, even in community property states and even though each spouse obviously benefits from an award of a lease to another spouse. *Duncan Miller*, 71 I.D. 121 (1964); *Solicitor's Opinion*, 64 I.D. 44 (1957). Nonetheless, the IBLA decision rules that a parent engages in a prohibited "multiple filing" if the child receives benefit from a lease which would relieve the parent of any parental obligations. *See* Dissent of Judge Fishman in *Celeste C. Grynberg, Dean G. Smernoff*, 44 IBLA at 205. That dissent holds in part:

> Under the laws of virtually every State, a husband has the solemn obligation to support his wife. Thus, in construing the oil and gas regulations, the Department finds possible support of wives no barrier, but support of children a preclusive factor. I submit this inconsistency renders the holding in the majority opinion arbitrary and capricious in that the definition of "sole party in interest," set out in 43 C.F.R. § 3100.0-5(b) is given a discreet construction when

the person holding the other interest is a spouse, and not a minor child.

The dissent properly notes the illegal and novel manner in which the regulation has been used in this case. The ruling is a substantial departure from the law of federal leasing as allowed and established in cases of multiple filings by members of one family: husbands and wives. The application of the IBLA decision to the facts of this case arbitrarily and capriciously applies 43 C.F.R. § 3100.0-5(b) to disqualify the Grynberg Trust, and that decision and the subsequent judicial decisions must be reversed and the subject lease must be awarded to the Grynberg Trust.

WHEREFORE, this Corrected Petition for Writ of Certiorari is filed this 25th day of January, 1984.

Respectfully submitted,

WELBORN, DUFFORD & BROWN

By: Phillip D. Barber

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CERTIFICATE OF SERVICE

I, Phillip D. Barber, certify that I am a member of the bar of this Court and that on January 25, 1984, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Corrected Petition for Writ of Certiorari, by first class mail, postage prepaid, to the following Defendants-Appellees:

William Clark, Secretary
United States Department of the Interior
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Solicitor General
Department of Justice
Washington, D.C. 20530

I certify that on January 25, 1984, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be served by first class mail, postage prepaid, the requisite number of copies of the foregoing Corrected Petition for Writ of Certiorari on the following counsel of record:

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I certify that all parties required to be served have been served.

Phillip D. Barber

APPENDIX A

9-21-83 81-1315

United States Court of Appeals
For the Tenth Circuit

SLIP OPINION

PUBLISH

United States Court of Appeals

TENTH CIRCUIT

CELESTE C. GRYNBERG AND
DEAN G. SMERNOFF AS
CO-TRUSTEES FOR THE STEPHEN
MARK GRYNBERG TRUST,

Plaintiffs-Appellants

v. No. 81-1315

JAMES G. WATT,
SECRETARY OF THE
UNITED STATES DEPARTMENT
OF THE INTERIOR, ET AL.,

Defendants-Appellees

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 79-K-1771)

Philip G. Dufford and Phillip D. Barber, Welborn, Dufford, Cook & Brown, Denver, Colorado, *for Plaintiffs-Appellants*

Carol E. Dinkins, Assistant Attorney General, Denver, Colorado; Joseph F. Dolan, United States Attorney, Richard A. Jost, Assistant United States Attorney, Denver, Colorado; Kathryn A. Oberly and Arthur E. Gowran, Attorneys, Department of Justice, Washington, D.C., *for Defendants-Appellees*

Before DOYLE, McKAY and SEYMOUR, *Circuit Judges*

DOYLE, *Circuit Judge*

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

In this appeal review and reversal is sought of a judgment of the United States District Court for Colorado, Opinion and Order in the consolidated cases of June Oil and Gas, Inc., et al v. Andrus, et al, No. 81-1178, and Grynberg, et al v. Andrus, No. 81-1315, 506 F. Supp. 1204 (D.Colo. 1981). The cases have been separated for review. Both parties filed cross motions for summary judgment. The trial court denied plaintiff-appellants' motion and granted defendant's motion.

FACTS

The salient facts are as follows: The Stephen Mark Grynberg Trust was established on August 1, 1969 by Jack Grynberg for his son Stephen Mark. Companion trusts were also established by the same instrument for Stephen's siblings Rachel Susan and Mariam Lela. These irrevocable discretionary support trusts are managed by co-trustees Dean G. Smernoff and Celeste C. Grynberg, the children's mother. In February, 1978, drawing entry cards were filed for parcel CO-167 by each of the three trusts, and by Jack Grynberg and Celeste Grynberg individually. There were 599 drawing entry cards filed in the lottery for parcel CO-167. The Stephen Mark Grynberg Trust received first priority on the parcel.

The Bureau of Land Management rejected all five offers as violative of the regulatory prohibition against multiple filings found at 43 C.F.R. 3112.5-2. Plaintiffs appealed to the Interior Board of Land Appeals which affirmed the bureau's rejection of the lease offers. *Celeste C. Grynberg, Dean G. Smernoff*, 44 I.B.L.A. 197, 203 (1979).

The district court affirmed the Interior Board of Land Appeals. Its conclusion was that the decision of the Interior

Board of Land Appeals (IBLA) rejecting the five offers was neither arbitrary, capricious, abusive of discretion or otherwise not in accordance with the law. Appellants are Celeste C. Grynberg and Dean G. Smernoff as co-trustees for the Stephen Mark Grynberg Trust. No other party has appealed.

The Rationale of the IBLA

The IBLA upheld the BLM's rejection of the offers of all parties. Its ruling was that where the parents and one of the children's trusts file simultaneous offers for the same parcel, the success of either of them would prove to be advantageous to the other. The reason for this was that the parent would be able to use trust assets for financial support of the children (albeit only in a financially disasterous situation). Thus, if the child's trust won a lease the parents would receive a direct benefit. Such would be in violation of § 3112.5-2 prohibiting multiple filings.

A second reason for the IBLA's decision is that a filing by co-trustees individually and on behalf of the trust created a prohibited multiple filing in that the co-trustees would be breaching the fiduciary duty owed to the trusts by competing with the trusts for the lease. The IBLA reasoned that if the trustee were to win the lease it would have to hold it in trust for the beneficiary. According to the Board, the result is or would be an increased probability of success for the trust in violation of the multiple filing regulation.

Appellants' Arguments

Appellants contend that a breach of a trustee's fiduciary duty exists only if the trustee substantially competes with the interest of the beneficiary. Since no showing of substantial competition was made by the BLM or the IBLA, appellants argue that it was error to find such a breach and reject the offers.

Appellants further maintain that the decisions below ignored express language in the trust. We refer to the provision which prohibits distribution from the trust to satisfy any

legal obligations of the parents to the child, the trust beneficiary. Appellants argue that the parents can receive no benefit if their child's trust is awarded the lease. The opinions below erred in basing their rejection of lease offers on this ground, according to appellants.

Application of the Law

This court in reversing an agency decision can set aside agency action found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 706 (2) (A) (1966); Sabin v. Butz, 515 F.2d 1061 (10th Cir. 1975). This standard of review is a narrow one. *Sabin*. Thus, if the agency interpretation is of an administrative regulation, there must be showing of a high level of deference to that interpretation. Udall v. Tallman, 380 U.S. 1 (1969). We are required to determine whether there has been a clear error of judgment. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

The IBLA and the district court both found that the filings in question violated the multiple filings prohibition of 43 C.F.R. 3112.5-2 (1978). This regulation states, in pertinent part:

> When any person, association, corporation or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or partly [sic] acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3110.1-6(b), all offers filed by either party will be rejected.

The issue is, did the Stephen Mark Grynberg Trust, which received the lease in the drawing, gain an increased probability of success in the drawing in view of the presence in the

pool of the co-trustees of the trust, or, conversely, did the trustees similarly gain an advantage due to the presence of the trust in the drawing? In the event of a determination of the truth of either of these statements, the offers of the trust and the trustees were properly terminated.

This circuit has had occasion to elaborate upon general trust principles and the duty owed to a trust by a trustee. In Wooten v. Wooten, 151 F.2d 147 (10th Cir. 1945) this court stated at pages 149-150 (footnote omitted):

> The standards of conduct for a trustee rise far above the ordinary morals of the market place. Not honesty alone, but a punctilio of honor the most sensitive is the standard of behavior required of a trustee. He must completely efface self-interest. His loyalty and devotion to his trust must be unstinted. Its well-being must always be his first consideration. These principles are inveterate and unbending.

Professor Scott in his treatise has elaborated upon these principles as follows:

> The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. This duty is imposed upon the trustee not because of any provision in the terms of the trust but because of the relationship which arises from the creation of the trust. A trustee is in a fiduciary relation to the beneficiaries of the trust. * * * It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries. He is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries.

2 Scott on Trusts § 170 pp. 1297-1298 (1967) (footnote omitted). In light of these statements, actions of appellants must be measured by very strict standards.

In our case the co-trustees, appellants herein, filed a D.E.C. on behalf of the Stephen Mark Grynberg Trust and

also filed D.E.C.'s *individually* in the drawing for the same parcel. Thus, the trustees were competing with the trust. The Restatement (Second) of Trusts, § 170(p) states that "[a] trustee violates his duty to the beneficiary if he enters into a *substantial competition* with the interest of the beneficiary" (emphasis added). Clearly the illustration provided by the Restatement and cases which cite and rely on this section demonstrate that this principle is designed to apply to situations where the trust carries on a business and the trustee enters into a competing business.[1]Competition is forbidden if it is "substantial." The quoted section of the Restatement is not the only controlling principle of law as appellants urge upon this court. Indeed, gauging by the illustration provided by the Restatement the "substantial competition" test is of questionable applicability to the case at bar. Rather, there are general principles regarding the fiduciary duty owed a trust which must be considered in deciding this case. According to these rules of law, discussed more fully below, Celeste Grynberg and Dean Smernoff as co-trustees of the Stephen Mark Grynberg Trust breached their fiduciary duty owed to the trust. Had either trustee won the lease, he or she would have held it in trust for the beneficiary, giving the trust three chances in the lottery in violation of § 3112.5-2 concerning multiple filings.

A trustee owes "an undivided duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of his original *cestui que trust*." 3 Pomeroy's Equity Jurisprudence § 1077.3 at 2473 (4th Ed.). A trustee must not place himself in a position in which his self interest will *or may* conflict with his duties as

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1. The illustration is as follows:

6. A bequeaths his business as yacht broker to B in trust for C and directs him to carry on the business. This business is a highly competitive one. B establishes nearby a business as yacht broker on his own account. B commits a breach of trust in so doing and can be enjoined from carrying on the competing business.

trustee. *See, e.g.*, Fulton National Bank v. Tate, 363 F.2d 562, 571 (5th Cir. 1966); Cleveland Clinic Foundation v. Humphreys, 97 F.2d 849, 856 (6th Cir. 1938), *cert. denied*, 305 U.S. 628 (1938); In re Estate of Coyle, 34 A.D.2d 612, 308 NYS 2d 899, 901 (3d Dep't 1970). *Coyle, supra*, points out that "[i]t is not necessary to show that the fiduciary has been guilty of fraud, bad faith or received a personal benefit. * * * It is sufficient to show that his personal interest *might be* in conflict with his duty as a fiduciary." 308 NYS 2d at 901 (citations omitted, emphasis in original).

In our case both co-trustees violated this principle by filing a D.E.C. in the same contest as the trust which they were duty-bound to administer. By filing D.E.C.'s the trustees created a situtation in which self-interests would have created a risk of conflict of with their duties as trustees. If one of the trustees had obtained a place ahead of the trust in the drawing, he or she would have been in a position of direct conflict with the trust; in essence it was usurping an opportunity from the trust. The trustee would be unable to take the lease without breaching his or her fiduciary duty to the trust. If the trust placed ahead of either trustee (for example, the trust placing first in the drawing and one of the trustees placing second or third), the trustee's personal interest might lead him or her to question the propriety of the trust's position in order to gain the lease for himself or herself. As the result of the sensitive duties mentioned, it is not necesary to show that the trustee actually questioned the trust's qualifications to gain the lease. If the result of the trustee being placed would be that he or she is in a position which would allow the trustee to act adversely to the interests of the beneficiary, he or she is then in violation of the duties owed to the trust.

The filing by the co-trustees individually breached their fiduciary duty to the trust. The lease would have been held for the trust if either trustee were awarded the lease. This gave the trust an increased probability of gaining a lease in violation of § 3112.5-2 requiring the rejection of all offers

involved. The trial court was correct in upholding the decision of the IBLA cancelling the offers.

The offers of the appellants and the trust were properly rejected on the breach of fiduciary ground: it is unnecessary for the court to discuss the propriety of the IBLA's decision concerning the parent (as such and not as trustee) and minor child's trust filing in the same drawing and whether this viiolated the multiple filing regulation. We need not reach this issue.

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUNE OIL AND GAS, INC., AND
COOK OIL AND GAS, INC.,

Plaintiffs,

v.

CIVIL ACTION
No. 79-K-1334

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES; DALE R. ANDRUS, COLORADO STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR; INTERIOR BOARD OF LAND APPEALS, UNITED STATES DEPARTMENT OF THE INTERIOR, AND JAMES L. BURSKI, EDWARD W. STUBBING AND JOAN B. THOMPSON, JUDGES THEREOF,

Defendants.

CELESTE C. GRYNBERG AND DEAN G. SMERNOFF AS CO-TRUSTEES FOR THE STEPHEN MARK GRYNBERG TRUST,

Plaintiffs,

v.

CIVIL ACTION NO. 79-K-1771

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES; DALE R. ANDRUS, COLORADO STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR; INTERIOR BOARD OF LAND APPEALS, UNITED STATES DEPARTMENT OF THE INTERIOR, AND JOSEPH W. GOSS AND JOAN B. THOMPSON, JUDGES THEREOF,

Defendants.

MEMORANDUM OPINION AND ORDER

Kane, J.

This action is a consolidation of two cases involving three plaintiffs, June Oil and Gas, Inc., (June Oil), Cook Oil and Gas, Inc., (Cook Oil) and Celeste C. Grynberg and Dean G. Smernoff as co-trustees for the Stephen Mark Grynberg Trust (Grynberg Trust). The facts in each case are different; however both allege that they were denied oil and gas leases, although their drawing entry cards or offers received priority in the lottery, and such denials were an abuse of discretion, arbitrary, capricious, and otherwise not in accordance with law. Plaintiffs' contend that the Secretary of the Interior ignored established legal principles and the plain meaning and intent of the prohibition against multiple filings contained in 43 C.F.R. 3112.5-2. Both cases are before the court on cross motions for summary judgment.

FACTS

The Grynberg Trust

The Stephen Mark Grynberg Trust was established on August 1, 1969 by Jack Grynberg for his son Stephen Mark. Companion trusts were also established by the same instrument for Stephen's siblings Rachel Susan and Mariam Lela. These irrevocable discretionary support trusts are managed by co-trustees Dean G. Smernoff and Celeste C. Grynberg, the children's mother. In February 1978, drawing entry cards were filed for parcel CO-167 by each of the three trusts, Jack Grynberg and Celeste Grynberg. The Stephen Mark Trust received first priority on the parcel.

The Bureau of Land Management rejected all five offers as violative of the regulatory prohibition against multiple filings found at 43 C.F.R. 3112.5-2. Plaintiffs appealed to the Interior Board of Land Appeals which affirmed the bureau's rejection of the lease offers. *Celeste C. Grynberg, Dean G. Smernoff*, 44 I.B.L.A. 197, 203 (1979). The board reasoned

that simultaneous offers for the same parcel by the children's parents and their trust and by a trustee of a trust and the trust proper both created a prohibited multiple filing under §3112.5-2. *Id.* at 202, 203. Plaintiffs now seek review of the decision, damages, injunctive relief, declaratory relief and extraordinary relief.

June Oil and Gas, Inc. and Cook Oil and Gas, Inc.

In June and July, 1978, June Oil and Cook Oil submitted offers for the simultaneous oil and gas lease drawings held by the Colorado State Office of the Bureau of Land Management. June Oil received first priority on parcel CO-337 and second priority on parcel CO-361, while Cook Oil received first priority on parcel CO-361. The bureau rejected each company's offer concluding that given the common officers, incorporators, address and other factors, the two corporations were interrelated and consequently had gained a greater probability of obtaining a lease. Both corporations appealed the decision and their cases were consolidated for review before the Interior Board of Land Appeals which affirmed the decision. June Oil and Cook Oil now seek review of the decision, damages, injunctive relief, declaratory relief, and extraordinary relief.

SCOPE OF REVIEW

Jurisdiction to review the judgment of defendant board is conferred upon me by the Administrative Procedure Act, 5 U.S.C.A. §§701, *et seq.* Judicial review of administrative action is based upon the full administrative record before the agency decision maker at the time the challenged action was taken. I am authorized to conduct a *de novo* review. *Cooperative Services Inc. v. United States Department of Housing and Urban Development*, 562 F.2d 1292, 1295 (D.C. Cir. 1977). *See also Ballard E. Spencer Trust, Inc. v. Morton*, 544 F.2d 1067 (10th Cir. 1976). In reviewing the agency's decision, it is not my function to weigh the conflicting evidence adduced at the administrative proceeding, but rather to

determine whether based upon the entire record there is substantial evidence to support the agency's determination. *Nickol v. United States*, 501 F.2d 1389 (10th Cir. 1974); *Roberts v. Morton*, 389 F.Supp. 87 (D.Colo. 1975), *aff'd* 549 F.2d 158 (10th Cir. 1976), *cert. denied* 434 U.S. 834 (1977).

5 U.S.C.A. §706(2)(a) requires a finding that the agency decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Sabin v. Butz*, 515 F.2d 1061 (10th Cir. 1975). The burden of proving that agency action is arbitrary and capricious is upon the plaintiff. *Angel v. Butz*, 487 F.2d 260, 263 (10th Cir. 1973), *cert. denied* 417 U.S. 967 (1974); *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F.Supp. 457, 478-479 (D.Kan. 1978), *aff'd* 602 F.2d 929 (10th Cir. 1979), *cert. denied* 444 U.S. 1073 (1980). To make this finding I must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 416. Although this inquiry must be searching and careful, the standard of review is a narrow one. I am not allowed to substitute my judgment for that of the agency. *Id.*, *American Petroleum Institute v. E.P.A.*, 540 F.2d 1023, 1029 (10th Cir. 1976) *cert. denied* 430 U.S. 922 (1977). Rather, I must uphold agency action that has a rational basis for its treatment of the evidence. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 281, 290 (1974); *Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979); *American Petroleum Institute v. E.P.A.*, 540 F.2d at 1029; *Sabin v. Butz*, 515 F.2d at 1061; *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F.Supp. at 4. If I determine that agency action has a rational basis, I must affirm that action even though I disagree with the agency's decision. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. at 290. Finally, if the agency interpretation is of an administrative regulation, I must show a high level of deference to that interpretation. *Udall v. Tallman*, 380 U.S. 1 (1964).

The Grynberg Trust

The terms of the prohibition against multiple filing in §3112.5-2 are not restricted to those instances where the applicants are owners. The regulation provides in pertinent part:

> When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or party acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to §3110.1-6(b), all offers filed by either party will be rejected.

The Interior Board of Land Appeals has held a variety of oil and gas interests sufficient to violate this provision. *See e.g., William R. Boehm*, 36 I.B.L.A. 346 (1978); *Panra Corporation*, 27 I.B.L.A. 220 (1976); *Richard Donnelly*, 11 I.B.L.A. 170 (1973); *Schermerhorn Oil Corporation*, 72 I.D. 486 (1965).

The first basis upon which the board found a prohibited multiple interest to exist is where parents and their children's trust file simultaneous offers for the same parcel. *Grynberg Trust*, 44 I.B.L.A. at 202. To reach this conclusion, the trust instrument was examined to ascertain the interests of the beneficiary relative to his parents and to Celeste Grynberg as co-trustee. Article VI of the trust agreement delineates support provisions and provides:

> It is the grantor's wish that the term "best interests" of the beneficiary be liberally construed and include not only the possibility of distributions for the *support, medical care and education (including professional education of said beneficiary but also the*

> *possibility of distributions for his comfort, convenience and happiness.* As illustrations, and not in limitations of the purposes for which distributions can be made under such standard, the trustee may make distributions or permit said beneficiary to travel for education or pleasure purposes or permit said beneficiary to purchase a personal residence or invest in a business. (Emphasis added.)

Parents are liable for the support obligations contemplated by the trust agreement. *Perkins v. Westcoat*, 3 Colo. App. 338, 33 P. 139 (1893) (support in general); *Union Pac. R. Co. v. Jones*, 21 Colo. 340, 40 P. 891 (1895) (medical expenses); *Haynes v. Haynes*, 41 Colo. App. 469, 586 P.2d 1010 (1978) (divorced parent may be liable for college education expenses); *VanOrman v. VanOrman*, 30 Colo. App. 177 (1971) (college education expenses). Any payment from the trust regarding these items would fulfill the obligation of the parents to support their child. Therefore, the success of this trust directly benefits the parents.

Plaintiffs argue, however, that the language of Article IV, Section 1 of the trust agreement is controlling. This article states:

> *Income and Principal.* The trustee is hereby authorized in the sole discretion of the trustee at any time and from time to time, to distribute all or any part of the income and/or principal of each separate trust to the beneficiary of such trust, as the trustee deems desirable for the best interests of said beneficiary, or to accumulate all or any part of such net income and the same to the principal of such trust, to be held, administered and distributed as a part thereof; provided, however, *that no distribution shall be made pursuant to this section which would satisfy a legal obligation of the Grantor.* (Emphasis added.)

Plaintiff's argue that given this provision, the legal obligation of the parents to support their children is undiminished by the trust, since in Colorado assets of a minor may not be used by parents for the support of such minor unless the parents are unable to furnish support. *Perkins v. Westcoat*, 3 Colo. App. 338, 33 P. 139. However the board decision correctly points out that the language in Art. IV could not be used to deny a child in want, for to do so would negate the specific directions of the trust. Thus, in a financially disastrous situation, although such a possibility may be remote, the parents could use the trust assets for the financial support of the children. The trust instrument also provides for such payments to be made directly to the child's guardian. Trust Agreement, Art. VIII, Sec. 2. Hence there is a benefit to the parents in the possibility of direct support payments for the child. *Farrel L. Lines, Trustee and Winston Trust*, 40 I.B.L.A. 91, 96.[1]

Plaintiff's contend that the possibility of a financial disaster so devastating to the Grynbergs that they would be unable to support their children is so remote that it cannot constitute a benefit such that a prohibited multiple filing exists. This argument is unpersuasive. While the chance of financial disaster may indeed be remote, if in fact it does occur, the parents will directly benefit from the trust. In addition, the parents receive the present and immediate benefit of knowing that if such a disaster were to occur, the trust assets of their children could be used to support them. Given the language of the trust agreement, there is no basis for

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1. *Farrel* also raises a similar point. The board states:

". . . , except in the most extraordinary circumstance, it would be sophistry to contend that the minor children of a family unit have no beneficial interest in the relative wealth or poverty of their parents. Therefore, even if the parents were successful in insulating themselves entirely from enjoyment of any advantage derived from the assets of their minor children, it would still be necessary, . . . , to demonstrate that the children's circumstances would remain unchanged regardless of whether their parents attained great wealth or were pauperized.

finding the board's interpretation arbitrary, capricious, abusive of discretion, or otherwise not in accordance with law.

The second basis upon which the board found a multiple filing was filing by a co-trustee individually and also on behalf of the trust. *Grynberg Trust*, 44 I.B.L.A. at 203. The board reasoned that the duty of loyalty demanded of a trustee requires avoidance of any situation or transaction in which personal and fiduciary interests might conflict. The Restatement (Second) of Trusts, §170 states that a trustee violates his duty to the beneficiary if he enters into a substantial competition with the interests of the beneficiary. Also, the Tenth Circuit Court of Appeals has specifically held that a trustee may not compete with his beneficiary in the acquisition of property. *Wootten v. Wooten*, 151 F.2d 147, 150, 161 ALR 1027 (1945). *See also*, 2 *Scott on Trusts*, §170.21 (3rd Ed. 1967). Therefore, the board concluded, since the trustee would be deemed to hold his personal offer in trust for the beneficiary, filing by a co-trustee individually and also on behalf of the trust is a prohibited multiple filing, requiring the rejection of the offers. *See McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

Plaintiff's contend that since the trust agreement, Art. 8, Sec. I(j), expressly authorizes the trustee to invest and reinvest in oil, gas, or other mineral interests, such conduct cannot be a breach of trust. This argument is likewise without merit. That a trustee may properly file a simultaneous drawing entry card in the name of a trust for a minor is well settled and not in dispute. *Margo Panos Trust*, 28 I.B.L.A. 1 (1976). The question, however, is whether the trustee can also file as an individual in the same drawing. Plaintiffs claim that since the grantor, Jack Grynberg, was regularly making oil and gas investments when the trust was formed, there would be no breach of the trustee's fiduciary duty by simultaneously filing as a trustee and as an individual. However, authorization for the trustee to invest in oil, gas, and mineral interests on behalf of the trust and on his own behalf is not authorization to compete for identical interests as trustee and as an individ-

ual. In addition, in this jurisdiction a trustee cannot compete with his beneficiary in the acquisition of property. *Wootten v. Wooten*, 151 F.2d at 147. Hence, in a breach of trust suit by the beneficiary of the trust, the beneficiaries would prevail, as in *Wahlenmaier*. Thus, the trustee would have gained an unfair advantage for the trust.

Plaintiffs also contend that there was not "substantial" competition, as required by the Restatement of Trusts. Plaintiffs also argue that *Wahlenmaier* is readily distinguishable from the instant case. In *Wahlenmaier*, the president and vice-president of a corporation filed on behalf of themselves and the corporation. The president of the corporation obtained first priority on the lease. The court held that the president was in a fiduciary relationship with the corporation and that in a suit by the stockholders he would be found to hold the lease in a fiduciary capacity for the use and benefit of the corporation. Hence, there was a prohibited multiple filing. Given *Wootten* a similar result would be reached here and the trustee would be deemed to hold the lease in a fiduciary capacity for the use and benefit of the trust. Contrary to plaintiff's contentions, the fact that the faultless beneficiary would be penalized by losing the lease rather than the officer who breached his fiduciary duty is immaterial. The other people filing for the lease were also faultless and they have been harmed by plaintiff's multiple filing on the parcel in question. Similarly, the fact that secretive and deceitful actions, found in *Whalenmaier*, did not take place in this case is also immaterial. As the board correctly points out, it is not necessary that the parents have conspired to evade the regulations. If the applicant is effectively given a greater chance of success in the drawing, it is inherently unfair whether there has been collusion or not. *Richard Donnelly*, 11 I.B.L.A. 170; *Schermerhorn Oil Corporation*, 72 I.D. 486 (1965).

The board's interpretation of *Whalenmaier* and its reasoning regarding the fiduciary relationship of a trustee to his beneficiary is not arbitrary, capricious, abusive of discretion

or otherwise not in accordance with law. Summary judgment in favor of the defendants is appropriate.

June Oil and Gas, Inc. and Cook Oil and Gas, Inc.

The board found that June Cook owns 100 per cent of June Oil and is chairman of its board of directors. Michael Cook owns 100 per cent of Cook Oil and is chairman of that corporation. At the time of the lease offers, the officers of each corporation were as follows:

	June Oil	Cook Oil
President/director	Michael Cook	June Cook
Secretary/treasurer/ director	Adrianna Van Der Stok	Adrianna Van Der Stok
Vice-President for land administration	Madeline A. Meyer	Kati P. Ward

All of these directors, including the chairmen of the boards, and officers were authorized to sign on behalf of their corporations with respect to oil and gas leasing matters. The articles of incorporations for each company state identical purposes, list the same incorporators, and designate initial registered officers with the same address. In fact the articles of incorporation are identical except for the names of the initial directors and registered agents. They were executed and filed with the State of Colorado on the same date. The two corporations have the same address, same business facilities and same personnel. *June Oil Gas, Inc. and Cook Oil and Gas, Inc.*, 41 I.L.B.A. 394, 396-397.

The board relied on *Schermerhorn Oil Corp.*, 72 I.D. 486 (1965) to find a prohibited multiple filing in this case. In that case Kenwood Oil Corp. and Schermerhorn Oil Corp. both filed offers for a single parcel. The offers were rejected for two reasons. First, it was found that Schermerhorn Oil Corp. owned 29 per cent of the stock of Kenwood Oil Corp. Therefore Schermerhorn had a one and one-fourth chance of obtaining a lease thereby creating an inherently unfair situation despite lack of collusion between the parties. The board

also rejected Kenwood's offer because of the interrelationship of the two companies. The board noted that the companies had the same officers, shared the same street address, filed at the same time, made identical offers, were represented by the same attorneys and submitted identical briefs in the proceedings before them. *Id.*, 72 I.D. 490-49 This is very similar to the instant case and is sound authority for finding that there was a prohibited multiple filing.

Plaintiffs correctly point out that in *Schermerhorn*, one corporation owned stock in the other, while in this case the corporations are independently owned. However, in *Schermerhorn* the board also rested its decision on the interrelatedness of the two companies, thereby creating an unfair advantage for both of them. Plaintiffs are also incorrect about the requirement of finding collusion of the parties. Such a finding is not necessary, according to *Schermerhorn*, when an inherently unfair situation, as in the present case, is created.

The board also applied the theory delineated in *Wahlenmaier*. There, it was held that when an officer of a corporation files on behalf of the corporation and on his own behalf he is usurping a corporate opportunity and thereby breaching his fiduciary duty to the corporation. As a result he holds it in trust for the corporation creating a prohibited multiple filing. In this case, by being a director in both corporations and filing on behalf of both corporations for the same parcel, there is a breach of fiduciary duty to one corporation when a second filing is made for the other because the first corporations chances of obtaining a lease are lessened by the second filing. Such dual filings could be justified only if they were beneficial to both; that is if they increased each corporations opportunity of obtaining an interest in the desired lease. As such the corporations are gaining unfair advantage and thereby provide additional support for finding a prohibited multiple filing.

Plaintiffs have not carried their burden of showing the agency's decision was arbitrary, capricious, abusive of discre-

tion or otherwise not in accordance with law. Summary judgment in favor of the defendants is appropriate.

In both cases the agency has carried out its duty of protecting other offerors from being put to an unfair advantage and providing each with an equal opportunity of obtaining an interest in the leases. The board has acted in accordance with the regulations and its past decisions. The defendants' interpretation of regulations is given deference and will not be overturned merely because reasonable minds can differ. It is therefore

ORDERED that Celeste Grynberg and Dean Smernoff's motion for summary judgment is denied and defendants motion for summary judgment is granted. It is further

ORDERED that June Oil and Gas, Inc. and Cook Oil and Gas, Inc.'s motion for summary judgment is denied and defendants motion for summary judgment is granted. Each party to bear his, her or its own costs.

DATED at Denver, Colorado this 16th day of January, 1981.

/s/

United States District Judge

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF LAND APPEALS

4015 Wilson Boulevard

Arlington, Virginia 22203

CELESTE C. GRYNBERG

DEAN G. SMERNOFF

IBLA 78-420 **Decided November 30, 1979**

Appeal from the decision of the Montrose Team Branch of Adjudication, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer C-26446.

Affirmed.

1. Oil and Gas Leases: Applications: Drawings

   When, in a drawing of simultaneously filed noncompetitive oil and gas lease offers, an offer is filed by a parent as cotrustee on behalf of a minor child, and another offer for the same land is filed by the parent individually, under 43 CFR 3100.0-5(b) the parent has an interest in the child's offer where trust proceeds may be used for support of the child, and the offers must be rejected. 43 CFR 3112.5-2.

2. Oil and Gas Leases: Applications: Drawings

   Where a cotrustee files individually in a simultaneous filing of oil and gas lease offers for the same parcel on which she files as cotrustee for the trust, both offers must be rejected under the regulation which prohibits the filing of multiple offers. 43 CFR 3112.5-2.

APPEARANCES: Philip G. Dufford, Esq., Welborn, Dufford, Cook, and Brown, Denver, Colorado, for appellant; Harold J. Baer, Jr., Esq., Office of the Regional Solicitor, Denver, Colorado, for the appellee, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Celeste Grynberg and Dean Smernoff, as cotrustees of the Stephen Mark Trust, appealed from the May 8, 1978, decision of the Bureau of Land Management (BLM), Montrose Team Branch of Adjudication, which rejected the trust's noncompetitive oil and gas lease offer CO-167.

The Stephen Mark Trust was established on August 1, 1969, by Jack Grynberg, for his son Stephen Mark Grynberg. This was one of three irrevocable discretionary support trusts created by the same settlor for his three children in a single trust instrument. Each trust is subject to all the terms outlined in this document. All three trusts are managed by cotrustees Celeste Grynberg and Dean Smernoff.

In the February 1978 drawing, held March 13, 1978, the drawing entry card (DEC) for the Stephen Mark Trust received first priority. Both of Stephen's parents, Jack Grynberg and cotrustee Celeste Grynberg, also filed DEC's for CO-167. In addition, DEC's were submitted by the same cotrustees for Stephen's siblings' companion trusts, the Rachel Susan Trust and the Miriam Lela Trust. BLM rejected all five offers as violative of the prohibition against multiple filing. 43 CFR 3112.5-2. BLM cited three reasons for its decision rejecting these offers as creating an unfairly enhanced mathematical advantage for the Grynbergs over other applicants for CO-167:

> 1. A parent of a trust beneficiary and that beneficiary's trust filed on the same parcel. This constitutes a multiple filing because the trusts are so drafted as to provide benefits either directly or indirectly to both the beneficiary and the parent should the trust receive a lease. This is the case because Articles VI and VIII of the Trust Agreement allow the trusts to pay necessary expenses of their children for which they are legally liable.

2. Where more than one trust competes for any one lease, an action prohibited under this regulation has occurred. This is so because, if the parents are relieved of any or all of their legally required expenses toward one child because of his trust's gaining of an oil and gas lease, they have more unobligated funds to spend on all of the children. Thus, each child-beneficiary and the parents benefit from any child's trust gaining a lease.

3. Whether a trustee files both individually and on behalf of the trust, a multiple filing exists because the trustee's fiduciary duty to the trust is such that were the trustee's individual filing to be successful, it would be held in a suit brought by a beneficiary of the trust that the trustee holds the lease in a fiduciary capacity for the use and benefit of the trust. The situation here is analogous to that presented in *McKay* v. *Wahlenmaier*, 226 F.2d 35 (1955), in which the court found a fiduciary relationship between corporate officers and a corporation with respect to simultaneous oil and gas filings.

The appellants argue on appeal that 43 CFR 3112.5-2 contains no explicit prohibition on trustee filing; therefore, denial of the trusts winning lease offer was improper. They argue that the parents' legal obligation to support their children is undiminished by the trust, therefore no multiple filings problem exists. The trust agreement in Article IV, Distribution Provisions, expressly forbids distributions that would satisfy a legal obligation of the parents, thus the grantor's intent is clear. The trust provides:

> *Section 1. Income and Principal.* The Trustee is hereby authorized in the sole discretion of the Trustee, at any time and from time to time, to distribute all or any part of the income and/or principal of each separate trust to the beneficiary of such trust, as the Trustee deems desirable for the best interests of said beneficiary, or to accumulate all or any part of such net income and add the same to the principal of such trust, to be held, administered and distributed as a

part thereof; provided, however, that no distribution shall be made pursuant to this Section which would satisify a legal obligation of the Grantor.

Appellants continue that although Article VI, Statement to Trustee, outlines specific support standards, the final sentence allows the language in Article IV to control.

> The grantor further desires that the Trustee, in making any distributions, consider not merely the general economic requirements of the beneficiary but also the ability of said beneficiary to deal with and manage the monies or property involved. Accordingly, it is the Grantor's preference that distributions, if any, be made in installments rather than in a single sum, unless the Trustee in his sole discretion determines that a lump sum distribution is then in the best interests of a beneficiary.
>
> It is the Grantor's wish that the term "best interests" of a beneficiary be liberally construed and include not only the possibility of distributions for the support, medical care and education (including professional education) of said beneficiary but also the possibility of distributions for his comfort, convenience and happiness. As illustrations, and not in limitation of the purposes for which distributions can be made under such standard, the Trustee may make distributions or permit said beneficiary to travel for education or pleasure purposes or to permit said beneficiary to purchase a personal residence or to invest in a business.
>
> This statement is intended solely as a guide to the Trustee and shall in no way be construed to alter, limit or enlarge the discretions and powers conferred upon the Trustee by any other provisions hereof.

Appellants add that although the trust instrument allows the trustee to distribute trust payments directly to the

parents, this clause refers only to distributable funds. They assert that under Colorado law a minor's assets may not be used for support unless the parents cannot afford to support the child. Therefore, they reason, since the Grynbergs are sufficiently wealthy to support their children, there is no danger here of use of trust assets for support. They point out also that spouses are both allowed to file oil and gas lease applications without conflict.

Neither do appellants see any conflict between the several children's trusts. They again argue that the parents' support obligation is undiminished if one child's trust is successful.

BLM argues that if one child's trust is successful, funds for supporting the others will necessarily be freed. BLM claims that parents and siblings will benefit if family funds are freed this way. In addition, all siblings and parents are direct or potential beneficiaries because in Article V they would receive distributions upon the death of the trust beneficiary. BLM cites the common address and common cotrustees as indicative of a "common scheme or plan thus violating the regulation." 43 CFR 3112.5-2.

BLM also argues that Federal oil and gas lease filings constitute ventures so speculative that they are inappropriate trust investments. BLM concludes that the appellants violate the spirit of the multiple filings provision by trying, with trusts, to gain a greater than the allowed even chance to secure a lease. The regulation states:

> §3112.5-2 Multiple filings.
>
> When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or partly [*sic*] acting for, on behalf of, or in collusion with the other person, association, corporation entity or business enterprise, under any agreement, scheme, or plan which would

> give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3110.1-6(b), all offers filed by either party will be rejected.

The Department has held a wide variety of oil and gas lease interests sufficient to violate the multiple filings prohibition. *June Oil and Gas, Inc.*, 41 IBLA 394, 86 I.D. 374 (1979); *Farrell L. Lines*, 40 IBLA 91 (1979); *William R. Boehm*, 36 IBLA 346 (1978); *Panra Corporation*, 27 IBLA 220 (1976); *Richard Donelly*, 11 IBLA 170 (1973); *Schermerhorn Oil Corp.*, 72 I.D. 486 (1965). These cases illustrate the broad application of the multiple filing regulation in order to ensure an equal chance for each applicant in the drawing. The terms of the prohibition against multiple filings, expressed in 43 CFR 3112.5-2, are not restricted to those instances where applicants would have actual ownership.

Departmental regulation 43 CFR 3100.0-5(b) defines the term "interest" broadly:

> (b) *Sole party in interest.*
>
> * * * * * * *
>
> An "*interest*" in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such "interests." Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease. [Emphasis supplied.]

The trustee's extremely broad powers are outlined in Article VIII of the trust instrument. This article empowers the trustee(s):

> (c) to continue to hold any or all property, real or personal, received by the Trustee from any person or fiduciary as a part of the trust estate or as an addition to the trust estate, even though the same be of a kind not usually considered suitable for trustees to select or hold, or be a larger proportion in one or more investments than the trust estate should, but for this provision, hold, including residential property, and irrespective or [*sic*] any risk, nonproductiveness, or lack of diversification * * *.

Trust Instrument VIII § 1.

In section 1(j), the trust instrument specifically contemplates oil and gas leasing. The appellants are correct in arguing that because the trust instrument contemplates this kind of investment, it is permissible. In addition, trust filing is specifically permitted by the current regulations. 43 CFR 3102.1-1(b); 43 CFR 3102.5; 43 CFR 3110.1-3(a). A trustee may properly file a simultaneous drawing entry card in the name of a trust for a minor. *Margo Panos Trust*, 28 IBLA 1 (1976). Therefore, we are not now concerned with the propriety of a trustee of a single trust filing an offer to lease.

The first issues to be resolved are whether the parents have any prospective advantage or benefit in increments, issues, or profits which may be derived from a lease won by the trust established for their minor child or whether the child would stand to accrue any benefit or advantage from profits derived from a lease won by his parents. Secondly, may a cotrustee file simultaneous lease offers both individually and on behalf of the trust without violating 43 CFR 3112.5-2, the prohibition against multiple filings?

Because the offers must be rejected for *each of* the two reasons set forth hereinbelow, it is not necessary to discuss whether the contingent remainders, which appellants state

were subject to being eliminated by power of appointment, nevertheless gave rise to a prohibited multiple interest under 43 CFR 3100.0-5(b) and 3112.5-2.

[1] The trust instrument must be examined in order to ascertain the interests of this beneficiary, relative to his parents and to Celeste Grynberg as cotrustee. Article VI outlines the trust's support standards. These items, medical care and education, are direct parental obligations. Any payments must necessarily fulfill the parents' support obligation, to the parents' benefit. This purpose, mentioned specifically in the trust instrument, indicates one of the grantor's intentions when the trust was created. Trust terms must be construed consistently. The precatory, general language in Article IV could not be used to deny support to a child who is in want. To do so would be to negate the specific directions of the trust instrument. Appellants have admitted the possibility, albeit remote, that in a disastrous financial situation, they would use the childrens' trust assets for support. The trust instrument notes that such payments may be made directly to the child's guardian. There is benefit to the parents in the possibility of direct support payments for the child.

Thus, where the parents and one of the children's trusts file simultaneous offers for the same parcel, the success of either of them would be advantagous to the other. Because of violation of sections 3100.0-5(b)and 3112.5-2, the offers were properly rejected. *Farrell L. Lines, supra.*

[2] As to the cotrustee filing individually for the same parcel on which she filed for the trust, trustee must meet standards above those of the ordinary marketplace. Her duty of loyalty demands avoidance of any situation or transaction in which her personal and her fiduciary interests would conflict. As stated in *Restatement (Second) of Trusts*, § 170 p: "A trustee violates his duty to the beneficiary if he enters into a substantial competition with the interest of the beneficiary." Further, it has specifically been held that a trustee a may not compete with his beneficiary in acquisition of property. *Wootten* v. *Wootten*, 151 F.2d 147, 150 (1945); 2 *Scott on*

Trusts § 170.21 (3rd ed. 1967). Filing by the cotrustee individually and also on behalf of the trust created a prohibited multiple filing under 43 CFR 3112.5-2, requiring rejection of such offers. *See McKay v. Wahlenmaier*, *supra*, and BLM decision quoted, *supra*.

For the result herein, it is not necessary that the parents have conspired to evade the regulations. Multiple filings gave the parents and the trusts greater mathematcial chances to benefit from the results of the drawings. An interest which an oil and gas lease applicant has in the offer of another applicant for the same land in a drawing of simultaneously filed noncompetitive lease offers, and which effectively gives the first applicant greater chances of success in the drawing, is inherently unfair whether or not there has been collusion or intent to deceive the Department. *June Oil and Gas, Inc.*, *supra*; *Richard Donelly*, *supra*; *Schermerhorn Oil Corp.*, *supra*.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/

Joseph W. Goss
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

Judge Goss and Judge Fishman both emphasize in part the familial relationship between one of the cotrustees and the beneficiaries of the various trusts. The cotrustee in her own right and as trustee for these 3 trusts filed offers in the same drawing. This Board has not yet ruled, as Judge Fishman's position seems to be, that minor children, through their appropriate guardian or trustee, and their parents may all participate in a drawing without violating the prohibition against multiple filings, even where the guardian or trustee is a parent. *See Charles J. King*, 40 IBLA 276 (1979). However, the implication in *Farrell L. Lines, Trustee*, 40 IBLA 91 (1979), and Judge Goss's opinion seems to be that because parents have obligations under the law to support minor children, children would have an interest in their parents offer. I believe this position should be examined by this Department.

Nevertheless, I do not believe we need to decide the issue in this case because the matter need not rest on the family relationship, but should rest upon the legal obligations and rights created by the trust instrument. Under that interest the beneficiaries of the trust and the presently designated cotrustee, Celeste C. Grynberg, all have contingent remainder interests. I believe this is a sufficient interest in the lease offer and lease as the word "interest" is defined by 43 CFR 3100.0-5(b) to include "any claim or any prospective or future claim to an advantage or benefit from a lease." Accordingly, I would rest the decision upon a finding that there was a multiple filing by a cotrustee for herself and for trusts where beneficiaries and the cotrustee have an interest in the offer of each other under the trust. Also, I agree with Judge Goss on the fiduciary issue.

/s/

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

The main opinion essentially ignores the language of section 1 of the trust agreement "that no distribution shall be made pursuant to this section which would satisfy a legal obligation of the Grantor."

While presumably this language is intended to protect the corpus and income of the trust from grantor's creditors, it also has the effect of precluding the grantor from utilizing those funds for another legal obligation, *i.e.*, the duty to support his children.

Article VI of the trust agreement referred to in the main opinion as vitiating that provision by stating that "medical care and education (including professional education)" are cognizable uses is nevertheless without that effect. Those provisions in Article VI are limited by the following therein: "This statement is intended solely as a guide to the Trustee and shall in no way be construed to alter, limit or enlarge the discretions and powers conferred upon the Trustee by any other provisions thereof." Thus the trustee is still bound not to spend money for those items for which a parent is required to expend for a minor child.

The majority blithely quotes the Restatement, Trusts, § 170p. "A trustee violates his duty to the beneficiary if he enters into a "*substantial* competition with the interest of the beneficiary." (Emphasis supplied.) It is not entirely clear that filing a DEC (drawing entry card) where thousands may be filed is "substantial competition."

Moreover, the effect of the decison is to discriminate against children, in essence favoring spouses, as explained *infra*.

The Department has permitted husbands and wives to file DEC's for the same tract, even in community property States. *Cf.* the casuistry employed in *Duncan Miller*, 71 I.D. 121 (1964). Such holdings by husbands and wives in such states have been treated as discrete for all purposes under the

mineral leasing laws. *See Solicitor's Opinion*, 64 I.D. 44 (1957). Under the laws of virtually every State, a husband has the solemn obligation to support his wife. Thus in construing the oil and gas regulations, the Department finds possible support of wives no barrier, but support of children a preclusive factor. I submit this inconsistency renders the holding in the majority opinion arbitrary and capricious in that the definition of "sole party in interest," set out in 43 CFR 3100.0-5(b) is given a discrete construction when the person holding the other interest is a spouse, and not a minor child.

I would reverse the decision below.

/s/

Frederick Fishman
Administrative Judge

No. 83-1236

In the Supreme Court of the United States

OCTOBER TERM, 1983

CELESTE C. GRYNBERG, AND DEAN G. SMERNOFF, ETC.,
PETITIONERS

v.

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the Department of the Interior's Board of Land Appeals (IBLA), the district court, and the court of appeals erred in finding that petitioner Celeste C. Grynberg breached her fiduciary duty to the Stephen Mark Grynberg Trust and violated Interior's prohibition against multiple filings for a single oil and gas lease when she filed oil and gas lease offers for the same parcel of land in her individual capacity and on behalf of the trust.

1.a. In February 1978, a simultaneous oil and gas lease drawing was held by the Department of the Interior for a parcel of land in Colorado.[1] Five hundred ninety-nine (599)

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[1]Pursuant to Section 17(c) of the Mineral Leasing Act, 30 U.S.C. 226(c), the Secretary of the Interior may lease a parcel of public land, which is not within a "known geological structure," to "the person first making application for the lease who is qualified to hold a lease * * *

drawing entry cards were submitted in competition for the subject lease. Among the cards filed were: a card on behalf of Celeste C. Grynberg and Dean G. Smernoff, in their capacity as co-trustees of the Stephen Mark Grynberg Trust; cards filed by the co-trustees on behalf of the Miriam Zela Grynberg Trust and the Rachel Susan Grynberg Trust; and cards filed by Celeste C. Grynberg and Jack J. Grynberg, parents of Stephen, Miriam, and Rachel, as individuals. The three Grynberg Trusts were created in 1969 by Jack Grynberg for the benefit of his and Celeste's children. Celeste Grynberg and Dean Smernoff, in their capacity as co-trustees for the Stephen Mark Grynberg Trust, drew first priority for the lease in question. Pet. App. A3.

b. On May 8, 1978, the Bureau of Land Management rejected the co-trustees' first priority offer on the ground that inclusion of the five Grynberg-related offers in a single drawing created an unfair situation that enhanced the mathematical advantage of the successful drawee over other applicants for the same parcel. The BLM determined that the Grynbergs had violated 43 C.F.R. 3112.5-2 (1978), which prohibits multiple filings by related entities. (The full text of the regulation is set forth at Pet. 6.) BLM concluded that prohibited multiple filings had been made because: (1) a parent of a trust beneficiary and the beneficiary's trust

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without competitive bidding." Because of the large number of applications received, it became difficult for Interior to determine which application was first filed. In response to that problem, the agency issued regulations under which all noncompetitive oil and gas lease applications for a given parcel are deemed to have been filed simultaneously. 43 C.F.R. 3112.1-2, 3112.2-1 (1978). Offerors are required to file their applications on drawing entry cards. Three cards are drawn at random, and the lease is issued to the first-drawn applicant (43 C.F.R. 3112.2-1(a)(3) (1978)), provided, among other things, that the successful applicant meets all regulatory requirements. The simultaneous oil and gas leasing program has been temporarily suspended for reasons unrelated to this case.

filed for the same parcel of land; (2) more than one family-related trust competed for the lease; and (3) one trustee, Celeste Grynberg, filed both on behalf of the trusts and as an individual. Pet. App. A24-A25.

c. The Grynbergs appealed BLM's decision to the IBLA. On November 30, 1979, the IBLA affirmed BLM's rejection of the co-trustees' lease offer (Pet. App. A23-A34). The IBLA held, after examining the trust instrument, that the filings by Celeste Grynberg individually and on behalf of the trust were prohibited because the success of either of them would benefit the other (*id.* at A30). The IBLA also held that the individual filing by Celeste Gynberg violated her fiduciary duty not to compete with the trust (*id.* at A30-A31).

d. The United States District Court for the District of Colorado affirmed the IBLA's decision (Pet. App. A10-A22).[2] The district court agreed that the parents would benefit if the trust were to win the lease because, in the event of financial disaster, trust assets could be used to satisfy the obligations of the parents to support the trust beneficiary (Pet. App. A17-A18). The court also agreed with the IBLA that Celeste Grynberg, as co-trustee, breached her fiduciary obligation to the trust by entering into competition with it (*id.* at A18-A19).

e. The court of appeals affirmed (Pet. App. A1-A9). It held that the co-trustees breached their duty to the trust, noting that had a trustee won the lease as an individual, he or she would have held it in trust for the beneficiary, thereby giving the trust a greater likelihood of success than is permitted by the applicable regulation (*id.* at A7). The court

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[2]The district court's decision was rendered in a consolidated opinion with *June Oil & Gas, Inc.* v. *Andrus*, 506 F. Supp. 1204 (D. Colo. 1981), aff'd, 717 F.2d 1323 (10th Cir. 1983), petition for cert. pending, No. 83-1235. Because the court of appeals rendered separate decisions, we are filing separate responses to the petitions.

also held that the trustees violated their fiduciary duty to the trust by entering into competition with it (*id.* at A8).[3]

2. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals, and further review of the fact-bound situation presented by the financial arrangements of the Grynberg family is not warranted.

a. Petitioners assert (Pet. 8) that a breach of a trustee's fiduciary duty occurs only if the trustee enters into "substantial competition" with the beneficiary. Petitioners maintain (Pet. 9) that there was no substantial competition here because 597 other drawing entry cards were submitted for the lease parcel in question. Petitioners' argument is without merit.

The number of drawing entry cards filed for a particular parcel is irrelevant for purposes of showing substantial competition between the trustee and the trust. As both the district court (Pet. App. A18-A19) and the court of appeals (*id.* at A7) correctly noted, what is relevant is that Celeste Grynberg as an individual competed for the lease against the trust. A trustee is held to extremely high standards, and the well-being of the trust must be his or her first consideration. There is thus nothing novel about the court of appeals' holding that the trustee cannot compete with the trust in the acquisition of property. See, *e.g.*, *Wootten* v. *Wootten*, 151 F.2d 147 (10th Cir. 1945).

b. Petitioners assert (Pet. 10) that the decisions of the agency and the courts below are arbitrary and capricious

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[3]The court of appeals appears erroneously to have assumed that co-trustee Dean Smernoff filed a lease offer in his own behalf. He did not, but the court's mistaken assumption is of no consequence. It is sufficient that one of the trustees, petitioner Celeste Grynberg, entered into competition with the trust.

because they ignore certain mandatory language of the Stephen Mark Grynberg Trust. Petitioners refer to Article IV, Section I, of the Trust Agreement, which prohibits distributions by the co-trustees that would satisfy parental obligations. Because of this provision, petitioners maintain (Pet. 11) that there is no possibility that the Grynberg parents would benefit from the issuance of a lease to a Grynberg trust. Here, too, petitioners are wrong.

Trust provisions must be read and construed in a consistent manner. Petitioners' reading and interpretation of Article IV, Section I, of the Trust Agreement vitiates the purpose of the trust, which is the support of the minor child. The IBLA carefully scrutinized the trust instrument to ascertain the interests of the trust beneficiary relative to his parents. Article VI, the IBLA noted (Pet. App. A26), delineates specific support standards. That trust article provides that the beneficiary's "best interests" are to be construed liberally "and include not only the possibility of distributions for the support, medical care and education (including professional education) of said beneficiary but also the possibility of distributions for his comfort, convenience and happiness" (*ibid.*). The IBLA properly noted (*id.* at A30) that these items are direct parental obligations, and, therefore, any such payments necessarily would fulfill the parents' support obligations and would be to their benefit.

The district court agreed with the agency's findings. It expressly found (Pet. App. A16) that any payment from the trust for the child's general support, medical expenses, or education would fulfill the parents' obligation to support their child. Accordingly, the court held that the success of the trust directly benefits the parents. This common-sense holding is clearly correct.

3. Petitioners claim (Pet. 12) that the decisions below are arbitrary, capricious and discriminatory in that they treat lease offers filed by parents and their children less favorably

than lease offers filed by husbands and wives. Petitioners further contend that the decisions below thereby deprived the Grynberg trust of a vested property right.

As an initial matter, it is clear that the Grynberg trust never had a vested property interest. The mere filing of an offer to lease confers no vested property rights in the applicant. *Arnold* v. *Morton*, 529 F.2d 1101, 1106 (9th Cir. 1976); *Burglin* v. *Morton*, 527 F.2d 486, 488 (9th Cir. 1976); *McTiernan* v. *Franklin*, 508 F.2d 885 (10th Cir. 1975); *Hannifin* v. *Morton*, 444 F.2d 200, 203 (10th Cir. 1971). A lease application constitutes "a hope, or perhaps expectation, rather than a claim." *Schraier* v. *Hickel*, 419 F.2d 663, 666 (D.C. Cir. 1969).

In any event, the agency has broad authority to promulgate and interpret its own regulations. Pursuant to that authority, the IBLA has held a wide variety of interrelated interests sufficient to violate the multiple filing prohibition set forth in 43 C.F.R. 3112.5-2 (1978). See *Farrell L. Lines*, 40 I.B.L.A. 91 (1979); *William R. Boehm*, 36 I.B.L.A. 346 (1978); *Panra Corp.*, 27 I.B.L.A. 220 (1976); *Richard Donnelly*, 11 I.B.L.A. 170 (1973). These cases, as the IBLA noted (Pet. App. A28), illustrate the broad application of the multiple filing regulation in order to ensure an equal chance for every applicant who files a lease offer in a drawing. The facts of this case do not indicate any departure from that principle.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

DOJ-1984-04